BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JERMEL WALKER	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,046,028
CITY OF TOPEKA	)	
Self-Insured Respondent	)	

ORDER

Claimant requested review of the April 23, 2012 Award by Administrative Law Judge (ALJ) Rebecca Sanders. The Board heard oral argument on July 25, 2012.

APPEARANCES

Roger D. Fincher, of Topeka, Kansas, appeared for the claimant. Sandra M. Sigler, of Topeka, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ concluded that although claimant had an accident, that accident was not competent to cause the injury that claimant reported to his spine and that the injury did not arise out of and in the course of his employment.

Claimant requests review of the ALJ's Award arguing that he did suffer an accidental injury arising out of and in the course of his employment with respondent and, therefore, he is entitled to a 10 percent whole person functional impairment.

Respondent contends that the ALJ's Award should be affirmed and compensation denied, as claimant has failed to prove that he suffered an injury which arose out of and in the course of his employment. In the event the Board finds the claimant met with personal injury by accident arising out of and in the course of his employment, respondent

argues that compensation should be based on medical testimony that accurately reflects claimant's impairment as it relates to the incident that occurred on April 1, 2009.

The issues are whether claimant's injury occurred in the course of his employment with respondent, and the nature and extent of claimant's disability.

FINDINGS OF FACT

Claimant works for the City of Topeka in maintenance at the water plant. Claimant has worked for respondent for five years. He started in distribution in 2005 and in 2007 was moved to maintenance. Claimant's job duties in 2009 were to maintain the pumps, the intakes, the basin, fabricate things for pipe, metal pipe, lids, valves, etc, and maintaining the intake grates where debris gathers.

Claimant testified that, on April 1, 2009, he suffered an injury to his low back while in the course of his employment. On that day, he was moving items out of the hazmat room, and onto a truck to drive them to another location. At one point, claimant was told by his supervisor to stock toilet paper on shelves in the work area. As he was stocking shelves with toilet paper he felt a pain in his back causing him to fall to his knees. Claimant stated that he was placing individual rolls of toilet paper on the shelves and after bending to grab some toilet paper and rising back up he felt a sudden and extreme pain in his back. Claimant testified that the foreman and his supervisor were working with him at the time and he reported to them that his back was hurting.[1] He was asked if he needed to go to the emergency room. He said, no, that he would try to stretch it out to see if the pain would go away. After a while, the pain began to affect his legs. He then decided that he needed to go to the emergency room. Claimant began working at 7:00 a.m. and he testified that this incident took place between 9:00 and 10:00 a.m. before the first break of the day.

Claimant was sent to St. Francis Medical Center where he was evaluated by Donald Mead, M.D. Dr. Mead returned claimant to limited duty, with a 15 pound lifting restriction. In early August, claimant was referred to Dr. Smith, who ordered an MRI of claimant's back and referred claimant for physical therapy. On August 27, 2010, claimant was diagnosed with lumbar spondylosis at L2-3 and L3-4. The MRI also displayed degenerative changes from L2-3 to L4-5. Claimant had a fair amount of disc protrusion at L2-3 and L3-4 on the left.

Claimant was then referred to Dr. Nicolae and underwent a series of injections. Claimant experienced slight improvement with the first two injections and more improvement following the third injection. On September 10, 2010, claimant underwent a

[1] R.H. Trans. (June 17, 2010) at 10.

lower extremity EMG by Wade Welch, M.D. Dr. Welch described the EMG as "nonspecific findings suggestive of a left S1 radiculopathy".[2]

Claimant continues to have problems with his back associated with prolonged sitting and standing. He experiences numbness and tingling in his legs and feet if he sits for long periods of time. Claimant testified that this has been going on since the April 1, 2009 accident. Claimant admits to a prior back injury at work, but could not recall the exact date. Respondent's counsel suggested that this incident took place in June 2008, and claimant did not disagree. Claimant believes this prior back injury was from shoveling. He did receive medical treatment including physical therapy for the injury and was able to return to full duty work with no restrictions.

Claimant also had an incident in September 2007 where he fell in a ditch and developed back pain and numbness in his left leg down into his feet.[3] Claimant's accident in 2007 occurred when a piece of asphalt or concrete fell into the ditch he was working in causing him to fall and hit his head. He had a hard hat on, but the impact knocked him back down and that is when he was injured. A few days later, claimant sought medical with Dr. Mead and Dr. Nicolae. He was referred for physical therapy. Claimant testified that he experienced numbness and tingling in his legs at that time. He was able to return to work at his regular job after this incident.

Claimant last testified on June 17, 2010. Since then he has had another accident which occurred while he was allegedly pulling drift wood away from a water intake area at the water plant on July 26, 2010. At that time, claimant noticed tightness in his back. The following day at work, he went to his car to get some paperwork. When he reached into the car he experienced discomfort in his back and at some point went to the ground for relief. That injury claim is not part of this litigation.

Claimant continues to have symptoms in his back, but not as bad and it depends on the day. When the pain becomes too much claimant takes painkillers to help him sleep or to help him do his job. Claimant testified that his low back pain goes down into his right leg causing numbness and tingling. Claimant has been able to manage his pain by adjusting his activity accordingly. Claimant continues to work for respondent, but has transferred into the distribution department, where the work is less physically demanding.

Joseph Patterson, a maintenance foreman for respondent, testified that he worked with claimant for three years. On April 1, 2009, he and the crew, which included claimant, were performing basic maintenance throughout the water treatment facility and that

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[2] Baker Depo. Ex. 2 at 3 (Dr. Baker's Dec. 14, 2010 report).

[3] R.H. Trans. (June 17, 2010) at 18.

claimant was assigned to resupply the shelves in the shop. Mr. Patterson stated that the entire facility is about two to three blocks wide.

Mr. Patterson acknowledged that the claimant did report that he had been injured. He testified that claimant told him that he hurt his back moving boxes of toilet paper.[4] Mr. Patterson testified that claimant didn't seem like he was in a lot of pain, just some discomfort, so he did not recommend that claimant seek medical attention, but he did tell claimant to take it easy. Mr. Patterson thought that it was Charlie Shinn who sent claimant to St. Francis for treatment.

Mr. Patterson testified that the boxes of toilet paper contained single rolls that claimant likely picked up two at a time with each hand to stock the shelves. He testified that there were no more than 50 rolls in the box and four shelves that were used for storing toilet paper and paper towel rolls. Each piece of shelving has three to four shelves about three feet high. Bending over to the floor and picking up the toilet paper was a part of this particular assigned task.

Mr. Patterson testified that he was not supervising the claimant the entire time he was stocking shelves, so he did not see claimant fall.

Charlie Shinn, a support manager at water distribution, testified that on April 1, 2009, he was working at the water treatment plant at I-70 and MacVicar as a Supervisor III. Mr. Shinn testified that his understanding of the event on April 1, 2009, was that claimant hurt his back and was referred to St. Francis Hospital. An accident report was filled out within two days of the accident. Mr. Shinn testified that paperwork showed that claimant had a prior injury to his back in July 2008 after shoveling lime in a basin.

At respondent's request, claimant met with board certified orthopaedic surgeon Phillip L. Baker, M.D., for an examination on December 2, 2010. Dr. Baker stated in his report that claimant presented in good general health. MRIs taken in 2007, 2009 and 2010 showed progression of degenerative disc disease. Dr. Baker noted that claimant's degenerative disc disease at L-2, L3-4, and L4-5 was not particularly severe, but was significant for someone claimant's age. He acknowledged that the fact that claimant is a smoker, coupled with a family history of spine disease, is a precursor for further symptomatology and degenerative spine changes in the future. In other words, claimant's condition would continue to progress.

Dr. Baker opined that claimant's reported back pain was related to very minimal activity and would appear to be the result of normal daily activity. He felt that this activity would not directly cause degenerative changes in the spine. He assigned claimant a five percent whole person impairment which occurred as a result of the normal aging process

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[4] Patterson Depo. at 6.

and the of normal activities of daily living.[5] This impairment is calculated pursuant to the 4th edition of the AMA *Guides*[6], with claimant falling under DRE Category II.

Claimant, at the request of his attorney, met with board certified disability evaluating physician Peter V. Bieri, M.D., for an examination, on October 13, 2009. Claimant complained of persistent low back pain, primarily with repetitive bending and lifting and occasional numbness and tingling extending into both thighs, depending on the level of activity. Dr. Bieri was provided limited medical records, including an MRI study performed on May 6, 2009. This study, which apparently included the report but not the actual films, indicated a disc herniation on the left side at L2-3 and lesser changes at L3-4. Claimant underwent two epidural block injections with only minimal relief. Surgery was discussed, but not pursued.

During the physical examination, claimant presented with persistent low back pain, occasional numbness and tingling extending into both thighs and pain at night. Dr. Bieri found no evidence of muscle spasm in claimant's back, reflexes were normal, claimant was able to walk on his heals and toes unassisted, and no atrophy was noted. Dr. Bieri knew nothing about claimant's prior injuries to his low back as he did not have any of claimant's prior medical records. None of the medical records, including the MRI studies from 2007 and 2008, were made available for his review.

Dr. Bieri found that claimant had a disc herniation and protrusion at two levels and clinical left lower extremity radiculopathy. In his report of October 13, 2009, Dr. Bieri assigned claimant a ten percent whole person impairment, under the 4th edition of the AMA *Guides*, DRE Category Lumbosacral III. This entire impairment is attributable to the April 1, 2009 accident. Dr. Bieri acknowledged that he had no way to determine whether claimant suffered from a pre-existing impairment as the result of his earlier injuries. He also acknowledged that claimant's description of the accident while he was lifting toilet paper was a movement common to all people in their daily lives at home.

Dr. Bieri was again deposed on February 14, 2012, but again was denied access to most of claimant's prior medical records. He acknowledged that he had no x-rays to review. He also agreed that, during the examination on October 13, 2009, claimant displayed no specific objective findings of true radiculopathy.

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[5] Baker Depo., Ex. 2 at 5-6 (Dr. Baker's Dec. 14, 2010 report).

[6] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are to the 4th edition unless otherwise noted.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[7]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[8]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[9]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[10]

The ALJ determined that claimant suffered an accident on the date alleged. However, she went on to find that claimant's accident was not competent to cause the injury that claimant reported to his spine. Therefore, the accident did not arise out of and in the course of his employment with respondent.

K.S.A. 44-508(e) states:

> (e) ''Personal injury'' and ''injury'' mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change

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[7] K.S.A. 44-501 and K.S.A. 44-508(g).

[8] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[9] K.S.A. 44-501(a).

[10] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

> be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

Respondent argues that claimant's injuries were the result of the natural aging process or were caused by the normal activities of day-to-day living. The Kansas Supreme Court in *Bryant*[11] addressed that issue. In a detailed decision, the Court analyzed a long history of cases on the issue of injuries and the physical requirements of job related labor versus the wear of day-to-day living.

In *Bryant* the claimant had a long history of persistent back pain, which caused him to miss a number of days of work leading up to an accident in August 1997. *Bryant* suffered a low back injury while jumping from a boat onto a dock. He underwent back surgery on October 15, 1998, with limited benefit.

On March 2, 2003, Bryant was working on a service call and stooped over to grab a tool out of his tool bag. When he twisted back to work, he felt a "pop" or a "snap". He experienced a sudden, severe increase of pain in his lower back, with a significant worsening of symptoms the following day. Both the ALJ and the Board awarded *Bryant* benefits, finding that he suffered a work related injury which arose out of and in the course of his employment. The Court of Appeals reversed, finding that *Bryant* was precluded from compensation because his injuries while "stooping" and "leaning" were the result of "normal activities of daily living." The Supreme Court granted *Bryant's* petition for review.

The Supreme Court, in an exhaustive analysis of a multitude of past cases, analyzed the statutory requirements that an accidental injury arise both "out of" and "in the course of" a workers employment. The Court, in its analysis stated:

> Although no bright-line test for what constitutes a work-injury is possible, the proper approach is to focus on whether the injury occurred as a consequence of the broad spectrum of life's ongoing daily activities, such as chewing or breathing or walking in ways that were not peculiar to the job, or as a consequence of an event or continuing events specific to the requirements of performing one's job. "The right to compensation benefits depends on one simple test: Was there a work-connected injury?. . .[T]he test is not the relation of an individual's personal quality (fault) to an event, but the relationship of an event to an employment." 1 Larson's Workers' Compensation Law § 1.03[1] (2011).[12]

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[11] *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 257 P.3d 255 (2011).

[12] *Bryant* at 595-596.

The Court determined that:

> Even though no bright-line test for whether an injury arises out of employment is possible, the focus of inquiry should be on whether the activity that results in injury is connected to, or is inherent in, the performance of the job. The statutory scheme does not reduce the analysis to an isolated movement-bending, twisting, lifting, walking, or other body motions-but looks to the overall context of what the worker was doing-welding, reaching for tools, getting in or out of a vehicle, or engaging in other work-related activities.
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> This approach is consistent not only with the specific language of the statute in question but also with the general purpose of workers compensation laws.[13]

The Court went on to determine that *Bryant* was not engaged in the normal activities of day-to-day living when he reached for his tool belt or when he bent down to carry out a welding task.[14] The Court reversed the denial of benefits by the Court of Appeals.

Claimant has a history of low back problems, although at the time of this incident he was working with no restrictions, performing his normal work duties for respondent. Here, claimant was placing toilet paper on a shelf when he experienced a sudden pain in his back. Nevertheless, this job task was clearly work-connected and obviously related to his employment. Claimant was following his supervisor's instructions in performing an activity connected to and inherent in the performance of his job.

The Board finds, based upon the Supreme Court's decision in *Bryant*, that claimant suffered personal injury by accident which arose out of and in the course of his employment with respondent.

K.S.A. 44-510e, in defining permanent partial general disability, states that it shall be:

> . . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.[15]

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[13] *Bryant* at 596.

[14] *Bryant* at 596.

[15] K.S.A. 44-510e.

K.S.A. 44-510e(a) states in part:

> An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.[16]

K.S.A 44-510e(a) also states in part:

> Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.[17]

Here claimant has returned to work for respondent, although in a different capacity, at a comparable wage. Therefore, his disability is limited to his functional loss, with no permanent partial general (work) disability being due.

Both Dr. Baker and Dr. Bieri provided functional impairment opinions pursuant to the AMA Guides, 4th ed. However, the weight to be given to Dr. Bieri's causation opinion is encumbered by a lack of records and background information on claimant. This claimant has suffered prior injuries, undergone prior medical treatment, including physical therapy, experienced multiple MRI tests and been temporarily restricted from doing his job. Dr. Bieri, even though deposed twice, was never provided with this significant medical history. The Board does not find the medical causation opinions of Dr. Bieri, in this instance, to be credible or persuasive.

Dr. Baker also rated claimant's functional impairment pursuant to the AMA Guides, 4th ed. He was provided with extensive medical information detailing claimant's past physical problems and injuries. His rating of five percent to the whole person was for claimant's pre-existing physical problems. He determined, after analyzing the past reports and tests, that claimant had suffered no permanent impairment from the accident on April 1, 2009. While the Board has found that claimant did suffer personal injury by accident on that date, this record does not support a finding that claimant's injuries resulted in a permanent worsening of his condition. Any change or lesion in the physical structure of claimant's body was only temporary. Therefore, no permanent impairment can be awarded from this accident. Claimant is, however, entitled to the temporary total disability compensation (TTD) and past medical treatment listed by the ALJ in the Award as paid.

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[16] K.S.A. 44-510e(a).

[17] K.S.A. 44-510e(a).

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be reversed to find that claimant suffered personal injury by accident which arose out of and in the course of his employment. Claimant is awarded the TTD and payment of medical treatment expenses listed in stipulations number 7 and 8 in the Award, but denied any permanent disability compensation from the accident on April 1, 2009.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Rebecca Sanders dated April 23, 2012, is reversed as claimant has satisfied his burden of proving that he suffered personal injury by accident which arose out of and in the course of his employment with respondent on April 1, 2009. Claimant is awarded the TTD and medical treatment listed in the Award, but denied any permanent disability compensation from the accident on April 1, 2009.

IT IS SO ORDERED.

Dated this _____ day of August, 2012.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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